May 13, 2024

Submitted Via Regulations.gov

The Honorable Miguel Cardona
Secretary
U.S. Department of Education
400 Maryland Ave. SW
Washington, DC 20202

Re: Notice of Proposed Rulemaking, ED-2023-OPE-0123, 89 Fed. Reg. 27564 (April 17, 2024)

Dear Secretary Cardona:

We write on behalf of Americans for Prosperity Foundation ("AFPF"), a 501(c)(3) nonpartisan organization that educates and trains citizens to be advocates for freedom, creating real change at the local, state, and federal levels. AFPF appreciates the opportunity to comment on the Department's proposal "to amend the regulations related to the Higher Education Act of 1965, as amended (HEA) to provide for the waiver of certain student loan debts."[1] AFPF is interested in this rulemaking because it believes it is important for the Department to respect statutory and constitutional limits on its authority and to uphold its duty to protect the public fisc.

Just last summer, the U.S. Supreme Court rejected the Department's usurpation of Article I powers in its attempt to unilaterally reorganize the nation's student loan debt.[2] We are concerned the Department is attempting to circumvent the Court's admonition, to again unilaterally and unlawfully pursue mass debt cancellation, and continue to ignore boundaries set by Congress and the Constitution on its powers. The Department should leave the job of legislating where it belongs: in the halls of Congress. "[T]he Constitution does not authorize agencies to use pen-and-phone regulations as substitutes for laws passed by the people's representatives."[3] To the extent the Department believes mass debt cancellation to be sound public policy, it must direct its appeals to the branch of government the Constitution tasks with making such decisions: Congress. Neither 20 U.S.C. § 1082(a)(6) nor any other provision in HEA authorize mass, or otherwise broad and programmatic, debt cancellation.

I. 20 U.S.C. § 1082(a)(6) Only Grants the Department Narrow Case-by-Case "Compromise" Authority for a Very Limited Subset of Student Loans and Does Not Apply to Direct Loans Governed Under Part D of the HEA.

The Department is a creature of statute, which possesses only those powers Congress chooses to confer upon it.[4] The Department thus bears the affirmative burden to establish statutory authorization for its actions.[5] "Congress need not expressly prohibit an agency action or negate an

[1] 89 Fed. Reg. 27,564, 27,564 (April 17, 2024).

[2] *Biden v. Nebraska*, 600 U.S. 477 (2023).

[3] *West Virginia v. EPA*, 142 S. Ct. 2587, 2626 (2022) (Gorsuch, J., concurring).

[4] *See id*. at 2609 (majority opinion); *La. Pub. Serv. Com v. Fed. Commc'ns Comm'n*, 476 U.S. 355, 374 (1986).

[5] *West Virginia v. EPA*, 142 S. Ct. at 2609 ("We presume that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.'" (citation omitted)); *La. Pub. Serv. Com*, 476 U.S. at 374; *see also Food &*

agency's claimed powers; "[w]ere courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with . . . the Constitution[.]"[6] And as the Supreme Court recently explained to the Department in *Biden v. Nebraska*, the HEA "authorizes the Secretary to cancel or reduce loans, *but only in certain limited circumstances and to a particular extent.*"[7]

As relevant here, 20 U.S.C. § 1082(a)(6) authorizes the Secretary "to enforce, pay, compromise, waive, or release any right, title, claim, lien, or demand, however acquired, including any equity or any right of redemption."[8] This summary "General powers" provision is tied to the "performance of . . . the functions, powers, and duties, vested in [the Secretary] by"[9] Part B of the HEA and thus only applies to loans made under the Federal Family Education Loan Program (FFEL).[10] It therefore does not apply to the Federal Direct Loan Program, which is instead governed by Part D of the HEA.

This limited power to "compromise" claims may only be used on a case-by-case basis under limited circumstances for borrowers who carry FFEL loans under circumstances specified by Congress. Section 1082(a)(6), a general provision, is limited by more specific provisions in Part B of HEA applicable to FFEL loans.[11] And even if 20 U.S.C. § 1082(a)(6) could arguably be read to extend to Direct Loans governed by Part D—it cannot—the "compromise" authority would be similarly circumscribed—again, on a case-by-case basis under circumstances specified by Congress.[12] The Department's existing regulations further confine this narrow "compromise" authority, limiting the circumstances in which it may be used.[13] The Department itself has admitted in a federal court filing that "the Secretary has most often used this authority to compromise student loan debts on an individualized, case-by-case basis, as opposed to providing group discharges,"

Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125 (2000) (agency "may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law." (cleaned up)).

[6] *Ry. Labor Executives' Assn's v. Nat'l Mediation Bd*., 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc).

[7] *Biden v. Nebraska*, 600 U.S. at 484 (emphasis added).

[8] 20 U.S.C. § 1082(a)(6).

[9] *Id*. § 1082(a).

[10] *See Pa. Higher Educ. Assistance Agency v. Perez*, 416 F. Supp. 3d 75, 95–96 (D. Conn. 2019) ("I have not found, and the parties have not cited, language incorporating into Part D the Secretary's 'general powers,' . . . from Part B."); *Fla. Coastal Sch. of Law, Inc. v. Cardona*, No. 3:21-cv-721-MMH-JBT, 2021 U.S. Dist. LEXIS 148639, at *61 n.21 (M.D. Fla. Aug. 9, 2021) ("Significantly, § 1082 is in Part B of the HEA, pertaining to the Federal Family Education Loan Program. . . . [T]he statutory provision on which the Department relies appears to be limited to the Department's duties in the particular part where it is found, Part B[.]"). Contrary to the Department's suggestion here, *see* 89 Fed. Reg. at 27,566 & n.4, 20 U.S.C. § 1087a(b)(2)—which states that Direct Loans "have the same terms, conditions, and benefits as loans made to borrowers under" Part B—does not expand the Secretary's "General powers" under 20 U.S.C. § 1082(a) to also encompass Direct Loans. That is because the Secretary's "General power" to "compromise" claims for FFEL loans under limited circumstances is plainly not a term, condition, or benefit of FFEL program loans. The Department's reliance on legislative history, *see* 89 Fed. Reg. at 27,566 n.4, is likewise misplaced, as legislative history cannot alter statutory text. *See Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 523 (2018) ("[L]egislative history is not the law."); *see also Oklahoma v. Castro-Huerta,* 142 S. Ct. 2486, 2496 (2022).

[11] *See* 20 U.S.C. §§ 1078, 1078-10, 1078-11, 1078-12, 1087. *See generally Morales v. Trans World Airlines, Inc*., 504 U.S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general."); *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012).

[12] *See, e.g*., 20 U.S.C. §§ 1087e(m), 1087j(c), 1087e(l).

[13] *See* 34 C.F.R. § 30.70(e)(1); 31 C.F.R. § 902.2(a).

also confirming that the first time it purported to provide a group discharge for students who attended schools engaged in malfeasance was 2019.[14]

The upshot is that the provision at issue here, 20 U.S.C. § 1082(a)(6), only authorizes narrow, targeted case-by-case adjustments for a limited subset of student loan borrowers for a limited subset of reasons and to a limited extent. Any negotiated rulemaking relying on or otherwise involving that provision must honor its limited scope.

II. The Major Questions Doctrine Further Confirms HEA Does Not Authorize Mass Debt Cancellation.

The Supreme Court found in *Biden v. Nebraska* that mass student debt cancellation implicates the major questions doctrine under the Court's precedent.[15] As the Court explained, "the basic and consequential tradeoffs inherent in a mass debt cancellation program are ones that Congress would likely have intended for itself."[16] Exactly so. The Department must therefore "point to clear congressional authorization to justify" any mass debt cancellation proposal.[17] It cannot. Even if 20 U.S.C. § 1082(a)(6) arguably could be read to authorize the Department to usurp Congress's exclusive legislative and appropriations powers, it blinks reality to suggest this provision *clearly* authorizes such sweeping executive action.

A. 20 U.S.C. § 1082(a)(6)'s Place in the Overall Statutory Scheme

Congress does not "typically use oblique or elliptical language to empower an agency to make a 'radical or fundamental change' to a statutory scheme."[18] So too here. If Congress wanted to grant the Department unfettered power to mass cancel student debt, it would have clearly said so.[19] It did not, instead saying the opposite.

The student loan statutory structure Congress has enacted makes clear that Congress generally expects borrowers to pay back their federally funded loans. For example, as a general matter, student loans are not dischargeable in bankruptcy.[20] And when Congress has wanted to authorize student loan relief, it has done so explicitly through targeted statutes narrowly authorizing relief to discreet subsets of borrowers under limited circumstances that also preserve the public fisc by allowing the Secretary to reinstate discharged loans or resume collection in specified circumstances.[21] None of those provisions apply here. 20 U.S.C. § 1082(a)(6) is an obscure, "rarely invoked statutory provision[.]"[22] As discussed above, nothing in that provision

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[14] *Sweet v. Cardona*, No. 19-cv-3674, D. Ct. Doc. 337, at 2 (N.D. Cal., filed Nov. 9, 2022)

[15] *See Biden v. Nebraska*, 600 U.S. at 503–06 .

[16] *Id.* at 506 (cleaned up).

[17] *Id.*

[18] *West Virginia v. EPA*, 142 S. Ct. at 2609 (majority opinion) (citation omitted).

[19] *See Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014).

[20] *See* 11 U.S.C. § 523(a)(8).

[21] *See, e.g.,* 20 U.S.C. §§ 1087 (repayment by the Secretary of loans of bankrupt, deceased, or disabled borrowers; treatment of borrowers attending schools that fail to provide a refund, attending closed schools, or falsely certified as eligible to borrow), 1087e(f) (deferment), 1087e(h) (borrower defenses), 1087e(m)(2) (loan cancellation amount), 1098cc (tuition refunds or credits for members of Armed Forces).

[22] *Cf. West Virginia v. EPA*, 142 S. Ct. at 2624 (Gorsuch, J., concurring).

purports to authorize, let alone clearly authorize, mass debt cancellation.[23] Indeed, simple "common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude,"[24] such as blanket student loan forgiveness, suggests Congress did not do so here. Congress is unlikely to grant unfettered power to mass cancel student debt to the Department "in so cryptic a fashion."[25]

B. Age and Focus of 20 U.S.C. § 1082(a)(6) in Relation to Mass Debt Cancellation

"Of course, sometimes old statutes may be written in ways that apply to new and previously unanticipated situations. But an agency's attempt to deploy an old statute focused on one problem to solve a new and different problem may also be a warning sign that it is acting without clear congressional authority."[26] That is the situation here. 20 U.S.C. § 1082(a)(6) has been on the books since 1965.[27] It was enacted many decades before the federal government took an active role in overseeing student loans and, even now, solely pertains to FFEL loans issued under Part B of HEA—a program that ended over a decade ago. It has no relevance to Direct Loans governed under Part D, which comprise the vast majority of outstanding student loans according to the Department's own data.[28] This further shows that 20 U.S.C. § 1082(a)(6) is not a vehicle that can be used to resurrect the unconstitutional mass debt cancellation.

C. The Department's Past Interpretations of 20 U.S.C. § 1082(a)(6)

The Department's prior interpretations of 20 U.S.C. § 1082(a)(6) further underscore the provision's limited scope and import, confirming that it only provides limited authority for a limited subset of loans for a limited subset of reasons. As the Supreme Court recently explained in *West Virginia v. EPA*, "as Justice Frankfurter has noted, 'just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.'"[29] That applies here. 20 U.S.C. § 1082(a)(6) has only been used on a case-by-case basis for decades, as the Department has admitted in a federal court filing.[30] Only since 2019 has it been used for group discharges relating to actions by specific schools.[31] This provides further evidence that the Department lacks authority under 20 U.S.C. § 1082(a)(6) to mass cancel student debt.

In sum, to the extent the Department intends to use the HEA to effect mass debt cancellation, it is likely to suffer the same fate as HEROES Act mass debt cancellation, which the

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[23] *See Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 139 (2005) (plurality) (suggesting "broad or general language" insufficient to find clear statement); *see also West Virginia v. EPA*, 142 S. Ct. at 2609 ("Extraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms," or "subtle device[s].'" (citation omitted)).

[24] *Brown & Williamson*, 529 U.S. at 133.

[25] *Id.* at 160.

[26] *West Virginia v. EPA*, 142 S. Ct. at 2623 (Gorsuch, J., concurring) (citation omitted).

[27] *See* Higher Education Act of 1965, Pub. L. No. 89-329, § 432(a)(6), 79 Stat. 1219 (Nov. 8, 1965)

[28] *See* U.S. Dep't of Educ., Federal Student Aid Portfolio, Summary, https://studentaid.gov/data-center/student/portfolio (in Q2 2024, 37.9 million borrowers owed $1.440.4 trillion for Direct Loans, while 7.9 million borrowers owed $176.1 billion in FFEL loans).

[29] 142 S. Ct. at 2610 (quoting *FTC v. Bunte Brothers, Inc*., 312 U. S. 349, 352 (1941)).

[30] *See Sweet v. Cardona*, No. 19-cv-3674, D. Ct. Doc. 337, at 2 (N.D. Cal., filed Nov. 9, 2022).

[31] *See id.*

Supreme Court held unlawful in *Biden v. Nebraska*.[32] If that is the Department's intent, it should not once again cruelly give borrowers false hope. If the Department wishes to pursue mass debt cancellation, it should abandon this rulemaking process and instead direct its appeals to Congress—the body the Constitution tasks with making policy choices of vast political and economic importance through the deliberately arduous legislative process.

Sincerely,

Michael Pepson
Cynthia Fleming Crawford
Americans for Prosperity Foundation

[32] 600 U.S. 477 (2023).